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In the Supreme Court of the United States

OCTOBER TERM, 1982

JIM MCNEFF, INC., PETITIONER

v.

FRANK L. TODD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether it is contrary to the policies of the National Labor Relations Act to permit monetary obligations that accrued under a prehire contract authorized by Section 8(f) of the Act, 29 U.S.C. 158(f), prior to its repudiation to be collected in a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, without proof that the union represented a majority of the employees.

2. Whether, in an action to collect overdue trust fund contributions under a valid Section 8(f) contract, Section 306(a) of the Multiemployer Pension Plan Amendments of 1980, 29 U.S.C. (Supp. IV) 1145, precludes an employer from raising the defense that the union never acquired majority status.

TABLE OF CONTENTS

	Page
Statement	1
Summary of argument	4
Argument:	
I. It is consistent with the policies of the National Labor Relations Act to permit monetary obligations that accrue under a prehire contract prior to its repudiation to be collected in a suit under Section 301 of the Labor Management Relations Act without proof that the union represented a majority of the employees	8
A. Section 8(f) of the National Labor Relations Act permits employers in the building and construction industry voluntarily to enter into agreements with unions that have not established their majority status, and this Court has characterized such "prehire agreements" as valid although "voidable"	8
B. Enforcement of obligations accrued under a prehire contract prior to its repudiation does not impair the right of employees to select their own bargaining agent	14
C. The policies underlying Section 8(f), as well as equitable considerations, support the conclusion that obligations accrued under contracts authorized by that Section may be enforced through private suits without proof that the signatory union represented a majority of the employees	21
II. Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980 precludes an employer from raising the union's minority status as a defense to an action to collect overdue trust fund contributions under a valid 8(f) contract	24

Argument—Continued Page

A. In enacting Section 306(a) Congress intended to foreclose the precise defense petitioner seeks to raise here 24

B. Section 306(a) is applicable to this case 29

Conclusion 31

TABLE OF AUTHORITIES

Cases:

Allied Chemical Workers v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 19

Baton Rouge Building and Construction Trades Council v. *E.C. Schafer Construction Co.*, 657 F.2d 806 12

Bonner v. *City of Pritchard*, 661 F.2d 1206 12

Bradley v. *Richmond School Board*, 416 U.S. 696 ..... 8, 29, 30

Connell Construction Co. v. *Plumbers Local 100*, 421 U.S. 616 22

Contractors Health & Welfare Plan v. *Associated Wrecking Co.*, 638 F.2d 1128 ..... 13, 18, 23, 24

Cort v. *Ash*, 422 U.S. 66 29

Florida Marble Polishers Health & Welfare Trust Fund v. *Megahee*, 102 L.R.R.M. (BNA) 2740 13

Hutto v. *Finney*, 437 U.S. 678 29

International Ladies' Garment Workers Union v. *NLRB*, 366 U.S. 731 10

International Union of Operating Engineers, Local 150 (Tri-City Excavating, Inc.), 255 N.L.R.B. 597 ..... 16, 18, 22

Laborers District Council v. *McDowell Contractors, Inc.*, 680 F.2d 94 12

Local 447 (Malbaff Landscape Construction), 172 N.L.R.B. 128 23

Martin v. *Benesh & Burns, Inc.*, 532 F. Supp. 408 21

Mullins v. *Kaiser Steel Corp.*, 642 F.2d 1302, rev'd, No. 80-1345 (Jan. 13, 1982) 7, 12, 25, 26, 27, 28, 29

NLRB v. *Haberman Construction Co.*, 641 F.2d 351 12

NLRB v. *Local 103, International Association of Bridge Workers (Higdon)*, 434 U.S. 335 ..... *passim*

Cases—Continued Page

NLRB v. *Strong*, 393 U.S. 357 19
New Mexico District Council of Carpenters v. *Mayhew Co.*, 664 F.2d 215 ..... 13, 18, 23
R.J. Smith Construction Co., Inc., 191 N.L.R.B. 693 17
Retail Clerks International Association v. *Lion Dry Goods, Inc.*, 369 U.S. 17 20
Ruttman Construction Co., 191 N.L.R.B. 701 17
Thorpe v. *Housing Authority of Durham*, 393 U.S. 268 29
United States v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102 29
W.C. James, Inc. v. *Oil Workers International Union*, 646 F.2d 1292 14
Washington Area Carpenters' Welfare Fund v. *Overhead Door Co.*, 681 F.2d 1 ..... *passim*
Western Washington Laborers-Employers Health and Security Trust Fund v. *McDowell*, 673 F.2d 1341 26
Woelke & Romero Framing, Inc. v. *NLRB*, No. 80-1798 (May 24, 1982) 22, 23, 25

Statutes:

Labor Management Relations Act, 29 U.S.C. 141 *et seq.*:
Section 301, 29 U.S.C. 185 ..... *passim*
Section 301(a), 29 U.S.C. 185(a) 12, 20
Section 302(c)(5), 29 U.S.C. 186(c)(5) 26
Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, 29 U.S.C. (& Supp. IV) 1000 *et seq.*:
Section 306(a), 29 U.S.C. (Supp. IV) 1145, Pub. L. No. 96-364, 94 Stat. 1295 ..... 7, 8, 24, 25, 27, 28, 29
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
Section 7, 29 U.S.C. 157 9
Section 8(a)(5), 29 U.S.C. 158(a)(5) 3, 5, 11, 12, 17, 18

Statutes—Continued Page

Section 8(b)(7), 29 U.S.C. 158(b)(7) 15
Section 8(b)(7)(C), 29 U.S.C. 158(b)(7)(C) 11, 12, 16, 20
Section 8(e), 29 U.S.C. 158(e) 27
Section 8(f), 29 U.S.C. 158(f) ..... *passim*
Section 9, 29 U.S.C. 159 10
Section 9(a), 29 U.S.C. 159(a) 9, 21

Sherman Act, 15 U.S.C. 1 *et seq.*:
Section 1, 15 U.S.C. 1 27
Section 2, 15 U.S.C. 2 27

126 Cong. Rec.:
p. H7899 (daily ed. Aug. 26, 1980) 25, 26
p. S10102 (daily ed. July 29, 1980) 26
p. S11673 (daily ed. Aug. 26, 1980) 25

H.R. 3904, 96th Cong., 2d Sess. (1980) 25
H.R. Rep. No. 741, 86th Cong., 1st Sess. (1959) .. 10
1 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (1959) 10
Restatement (Second) of Contracts (1981) 23
S. 1076, 96th Cong., 2d Sess. (1980) 25
S. Rep. No. 187, 86th Cong., 1st Sess. (1959) 10
Staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980, S. 1076: Summary and Analysis of Consideration* (Comm. Print 1980) 25

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States (J.A. 59).*

STATEMENT

1. Petitioner, an employer in the construction industry, obtained a subcontract on a construction project for which the general contractor was bound by the Master Labor Agreement ("the Agreement") negotiated between the International Union of Operating Engineers ("the

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* The National Labor Relations Board takes no position with respect to the second issue, the effect of the Multiemployer Pension Plan Amendments Act of 1980.

Union") and the Southern California General Contractors Associations. The Agreement prohibited the subcontracting of work to be performed at the construction site except to a subcontractor signatory to a labor agreement with the Union. It also contained a union security clause requiring covered employees to become members of the Union (J.A. 38-39).

On September 13, 1978, petitioner's president, Jim McNeff (McNeff), was approached on the jobsite by a representative of the Union, who informed him that in order to remain on the project he was required to sign the Agreement. McNeff initially refused, but when the Union representative returned with a representative of the general contractor, who stated the same requirement for remaining on the project, McNeff signed the Agreement.[1] Petitioner's three employees were advised that the union security provision of the Agreement required them to sign union cards, and they did so that same day (Pet. App. 2, 14, 16; J.A. 40).

The Agreement required petitioner to make monthly contributions to fringe benefit trust funds on behalf of each covered employee (J.A. 12-13). From October 1978 through March 1979 petitioner submitted required monthly reports to the trust funds, but made no contributions. Petitioner stated in each report that "no members of this craft were employed during the month" (Pet. App. 2).

In November 1978, after petitioner filed the first such report, respondents, the trustees of the funds, requested permission from petitioner to audit its records to verify the statements made in its monthly report. Petitioner agreed, but then postponed the audit several times. Fi-

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[1] Specifically, petitioner signed an agreement with the Union's Local 12 that "adopted [the Master Labor Agreement] in its entirety," with certain specified exceptions (J.A. 9-13). We use "the Agreement" herein to refer to both the Master Labor Agreement and the agreement between petitioner and Local 12 incorporating by reference the majority of the terms of the Master Agreement.

nally, on April 4, 1979, respondents brought suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, to compel an accounting and payment of any contributions found to be due the trust funds. An audit performed shortly thereafter revealed that petitioner had employed five employees covered by the Agreement during the period October 1978 through March 1979 and therefore owed a total of $5,316.79 in trust fund contributions for that period (Pet. App. 2; J.A. 27-31).[2]

2. The district court granted respondents' motion for summary judgment and ordered payment of the unpaid trust fund contributions (Pet. App. 10-11). The court of appeals affirmed (Pet. App. 1-9).

The court of appeals noted at the outset that the agreement between petitioner and the Union was a prehire agreement entered into before the Union represented a majority of petitioner's employees. The court further noted that Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f), permits an employer in the construction industry to enter into such an agreement, although the agreement does not establish a binding bargaining relationship until the union represents a majority of the employees. The court rejected petitioner's contention that, because it was entitled to repudiate the prehire agreement on the ground that the Union had not obtained

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[2] A month after respondents instituted suit, petitioner filed an election petition with a Regional office of the National Labor Relations Board for a unit comprising its employees performing work of the kind covered by the Agreement. The Union responded by filing a charge alleging that petitioner had violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), by failing to comply with the Agreement and repudiating it. The Regional Director declined to issue a complaint on the ground that the execution of the prehire agreement and the action of the three employees in joining the Union at petitioner's behest were inadequate to establish a full collective bargaining relationship between petitioner and the Union. The Regional Director's refusal was sustained on appeal to the Acting General Counsel. In the subsequent election, petitioner's employees voted against representation by the Union (Pet. App. 2, 29-35; J.A. 50-53).

majority status, the agreement was void ab initio and could not be judicially enforced even prior to repudiation. Citing *NLRB* v. *Local 103, International Association of Bridge Workers* (*Higdon*), 434 U.S. 335, 341 (1978), for the proposition that a prehire agreement is "voidable" rather than void, the court of appeals concluded that the agreement could be enforced until the employer exercised its right to repudiate it (Pet. App. 3-7).

The court also found that petitioner had not repudiated the contract. It pointed out (Pet. App. 8) that "[t]he only act in the record which could possibly be argued to be a repudiation is the employer's failure to perform its contractual obligations." While the court recognized (*ibid.*) that, in some cases, as in *Higdon*, "noncompliance can be so bald as to put the union on notice of the employer's intent to repudiate," it found no such notice inherent in petitioner's conduct—"enjoying the benefits of a pre-hire agreement and misleading the union as to the employer's intention of never performing its obligations" (*ibid.*).

Finally, the court of appeals held (Pet. App. 8) that it was immaterial whether the circumstances under which petitioner signed the agreement constituted coercion "because the employer has raised this issue in the wrong way." The court explained that petitioner should, instead, have treated the alleged coercion simply as a ground for repudiation. In the absence of such repudiation, the court held, the contract remained enforceable (*id.* at 8-9).

SUMMARY OF ARGUMENT

I

Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f), allows employers engaged primarily in the building and construction industry and unions that have not yet established their majority status to enter into agreements covering employees who are "engaged (or who, upon their employment, will be engaged) in the

building and construction industry * * *." Permitting monetary obligations that accrue under such an agreement prior to its repudiation to be collected in a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, comports with the policies of the National Labor Relations Act.

A Section 8(f) contract both serves as a preliminary step to the union's achieving status as bargaining representative, and also "sets the compensation for services rendered to the employer while the agreement remains in effect." *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 681 F.2d 1, 9 (D.C. Cir. 1982). Such an agreement is voluntary, and the employer retains the right unilaterally to repudiate or modify it in the absence of the union's establishment of majority status. These principles are in no way compromised by retrospective enforcement of an 8(f) agreement for the period prior to repudiation. Such enforcement does not require the employer to continue to recognize or bargain with the union, but merely requires it to perform its part of a bargain already struck at a time when it lawfully and voluntarily recognized the union—and then only until it makes clear that the bargain is no longer operative.

Moreover, the final proviso to Section 8(f) affords employees the right to call for an election at any time if they are dissatisfied with an 8(f) agreement. The exercise of the employees' right to reject the contract terminates the union's Section 8(f) right to act as a lawful representative of the employees for the future. Collecting obligations that accrued prior to that time thus is not inconsistent with the employees' free choice of bargaining representative.

Contrary to petitioner's repeated assertions, there is no inconsistency between the Board's holding that an employer does not violate Section 8(a)(5) of the Act by refusing to honor a prehire agreement where the union has not established its majority status and permitting private suits for the collection of wage and fringe benefit payments owed under a lawful 8(f) contract that the

signatory employer purported to honor during the period covered by the suit. The statutory obligation to recognize and bargain with a union applies only to the representative of a majority of the employees in the bargaining unit. Hence, the failure of an employer openly to repudiate a contract is irrelevant in an unfair labor practice case, if the union actually lacks majority status. But this does not mean that any policy of the Act is violated when a court in a Section 301 suit holds an employer to its bargain under a Section 8(f) contract for a period prior to the time the union was notified of the employer's repudiation.

To the contrary, the policies underlying Section 8(f), as well as equitable considerations, fully support the conclusion that obligations accrued under contracts authorized by that Section may be enforced in private suits without proof that the signatory union represented a majority of the employees. One of the reasons for Congress' enactment of Section 8(f) in the first place was its recognition that it was not feasible for unions in the construction industry to demonstrate majority support because of the short duration of employment in that industry. Surely Congress did not intend unions to be required to make a showing in suits to enforce Section 8(f) contracts that it considered nearly impossible to make when enacting that Section. Moreover, as the District of Columbia Circuit observed in *Overhead Door*, *supra*, 681 F.2d at 9, "[w]e do not believe Congress intended to permit an employer to accept labor services under a prehire agreement, refuse to pay wages, and yet be immune from suit to recover the wages on the ground that the contract is unenforceable."

Nor is any legitimate employer interest impaired if the wages and fringe benefits earned by employees under lawful 8(f) contracts are recoverable in Section 301 suits. Employers are under no statutory compulsion to enter into such agreements, and those who voluntarily do so receive valuable benefits in return.

II

Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980 (MPPA), 29 U.S.C. (Supp. IV) 1145, provides an alternative ground for affirmance of the decision of the court of appeals. That Section requires employers who are obligated to make contributions to multiemployer plans under the terms of the plan or under the terms of a collective bargaining agreement to make such contributions "to the extent not inconsistent with law." It was enacted because simple collection actions brought by trustees of multiemployer plans had been converted into complex litigation by employers' raising defenses unrelated to their promise to pay and the plans' entitlement to the contributions. During floor debate on the provision, its sponsor in each House cited as an example of the defenses the legislation was designed to abolish the precise defense petitioner urges here. This legislative history establishes clearly that Congress intended that trust fund contributions due under a Section 8(f) agreement would be recoverable notwithstanding the minority status of the signatory union.

This contention is fully consistent with this Court's decision last term in *Kaiser Steel Corp.* v. *Mullins*, No. 80-1345 (Jan. 13, 1982). In that case, the Court held that Section 306(a) did not abolish illegality defenses. But, unlike NLRA Section 8(e), which was at issue in *Kaiser Steel* and which expressly makes agreements prohibited thereunder "unenforceable and void," Section 8(f) specifically sanctions prehire agreements; it thus would not have been inconsistent with law for petitioner to have honored the Agreement in the absence of the Union's establishing majority status. Accordingly, it is irrelevant to this case that illegality defenses to actions seeking recovery of trust fund contributions survived Section 306(a).

As the law currently in effect, Section 306(a) is applicable to this case notwithstanding that the MPPA was not in effect at the time the Agreement was signed. Neither the language nor the legislative history of Section

306(a) contains any suggestion that it was not intended to apply to pending cases. Nor would its application in this case result in "manifest injustice." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974). The defense of unenforceability does not assert a vested private right. Moreover, the application of Section 306(a) to this case imposes no unforeseeable liability on petitioner, since it all along has known that it is a party to a contract that imposes on it the very obligations that it is now attempting to avoid.

ARGUMENT

I. IT IS CONSISTENT WITH THE POLICIES OF THE NATIONAL LABOR RELATIONS ACT TO PERMIT MONETARY OBLIGATIONS THAT ACCRUE UNDER A PREHIRE CONTRACT PRIOR TO ITS REPUDIATION TO BE COLLECTED IN A SUIT UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT WITHOUT PROOF THAT THE UNION REPRESENTED A MAJORITY OF THE EMPLOYEES

A. Section 8(f) of the National Labor Relations Act Permits Employers in the Building and Construction Industry Voluntarily to Enter Into Agreements With Unions That Have Not Established Their Majority Status, and This Court has Characterized Such "Prehire Agreements" as Valid Although "Voidable"

1. Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f), was added to the Act in 1959 by the Landrum-Griffin Amendments, Pub. L. No. 86-257, 73 Stat. 545.[3] The Section permits employers engaged pri-

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[3] Section 8(f) provides:

> Agreements covering employees in the building and construction industry
>
> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agree-

marily in the building and construction industry and unions that have not yet established their majority status to enter into agreements covering employees who are "engaged (or who, upon their employment, will be engaged) in the building and construction industry * * *." Such agreements are known as "prehire agreements." As the Court recognized in *NLRB* v. *Local 103, International Association of Bridge Workers (Higdon)*, 434 U.S. 335, 345 (1978), Section 8(f) is an exception to the Act's usual proscription against bargaining between an employer and a union in advance of the union's establishing that it represents a majority of the employees in an appropriate bargaining unit.[4] This ex-

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ment covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

[4] Section 7 of the Act, 29 U.S.C. 157, guarantees employees the right to bargain collectively "through representatives of their own choosing." Section 9(a), 29 U.S.C. 159(a), limits the right to act as exclusive representative of employees for purposes of collective

ception, however, is of limited scope. A proviso to the Section declares that an 8(f) contract "shall not be a bar to a petition" for an election under Section 9.[5] Thus, "[t]he employer and its employees—and the union itself for that matter—may call for a bargaining representative election at any time" (*Higdon, supra*, 434 U.S. at 345).

In *Higdon*, the Court was concerned with "the legal questions of how § 8(f) is to be construed and of what

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bargaining to "[r]epresentatives designated or selected * * * by the majority of the employees in a unit appropriate for such purposes * * *." It is thus normally an unfair labor practice for an employer to grant, and for a union to accept, recognition as an exclusive representative at a time when the union lacks the support of a majority of the employees in the relevant unit. See, e.g., *International Ladies' Garment Workers Union* v. *NLRB*, 366 U.S. 731 (1961).

Section 8(f) was enacted in response to the special characteristics of the construction industry:

> In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired. One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral.

S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959), 1 Leg. Hist. 424; see also H.R. Rep. No. 741, 86th Cong., 1st Sess. 19 (1959), 1 Leg. Hist. 777 ("Leg. Hist." refers to the two-volume *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (1959)). See also *Higdon, supra*, 434 U.S. at 348.

[5] A union normally is protected from inquiry into its majority status during the term of a collective bargaining agreement. *Higdon, supra*, 434 U.S. at 345.

consequences the execution of a prehire agreement has on the enforcement of other sections of the Act, primarily §§ 8(a)(5) and 8(b)(7)(C)" (434 U.S. at 341).[6] Sustaining the Board's construction of these sections, the Court held that an agreement privileged by Section 8(f), while lawful, does not create a full collective bargaining relationship between the union and employer signatories, and that until this preliminary step towards such a relationship culminates in the establishment of a union majority among the relevant employee group, the agreement is "voidable" (*ibid*). Thus, an employer may violate or repudiate such an agreement without fear of liability under Section 8(a)(5) of the Act. See 434 U.S. at 345-346.

Furthermore, with respect to Section 8(b)(7)(C), the Court held that the Board could conclude that picketing to enforce a Section 8(f) agreement by a union that had not acquired majority status was tantamount to picketing to require recognition as the exclusive bargaining agent of the employer's employees. 434 U.S. at 346-349. It therefore affirmed the Board's finding that, since the picketing union in *Higdon* had failed to request an election within 30 days, its attempt to enforce its 8(f) agreement with the employer by picketing beyond that period violated Section 8(b)(7)(C).

2. An issue left unresolved in *Higdon* (see 434 U.S. at 351-352) is whether a Section 8(f) agreement, which an

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[6] Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. "Under § 8(b)(7)(C), a union that is not the certified representative of the employees in the relevant unit commits an unfair labor practice if it pickets an employer with 'an object' of 'forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees' and if it does not within 30 days file a petition for an election under § 9(c)." *Higdon, supra*, 434 U.S. at 338. The provision has not been construed literally, however. The Board holds that picketing by a union having majority support in an attempt to enforce a collective bargaining agreement is not barred by Section 8(b)(7)(C). 434 U.S. at 342-343.

employer is free to avoid without violating Section 8(a)(5) of the Act and which a union is not free to enforce beyond the limits set in Section 8(b)(7)(C), may nevertheless be enforced, in some or all respects, by a breach of contract action brought under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. 185(a). The courts of appeals have divided on this issue, with a majority of them joining the court below in answering the question in the affirmative.

The Fifth Circuit, relying on the statement in *Higdon*, *supra*, 434 U.S. at 345, that a construction industry "employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites," has held that a Section 8(f) agreement can never be enforced in a Section 301 suit unless it is first determined that the union represented a majority of the employees in the relevant unit. *Baton Rouge Building and Construction Trades Council* v. *E.C. Schafer Construction Co.*, 657 F.2d 806, 809, 812-13 (1981). The Eleventh Circuit, believing itself bound by this Court's decision in *Kaiser Steel Corp.* v. *Mullins*, No. 80-1345 (Jan. 13, 1982) (see pages 27-28, *infra*), and a prior decision of the en banc Fifth Circuit (*NLRB* v. *Haberman Construction Co.*, 641 F.2d 351 (1981)),[7] appears to have adopted the same view. *Laborers District Council* v. *McDowell Contractors, Inc.*, 680 F.2d 94 (1982).

By contrast, the Ninth Circuit in the present case and the District of Columbia Circuit in *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 681 F.2d 1 (1982), have adopted the view that *Higdon*'s characterization of 8(f) agreements as "voidable" (434 U.S. at 341) extends to Section 301 enforcement suits as

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[7] As the Eleventh Circuit noted (*Laborers District Council* v. McDowell Contractors, Inc., 680 F.2d 94, 95 n.3 (1982), it is bound by decisions rendered by the "old" Fifth Circuit prior to October 1, 1981. See *Bonner* v. *City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

well. As Judge Wilkey explained for the court in *Overhead Door Co., supra*, 681 F.2d at 8,

> [S]ection 8(f) agreements are enforceable in a breach of contract action for the period from the date the agreement was made until the date when either party manifests its intent to void the agreement. We emphasize the limitations on this holding. Until the minority union obtains support of a majority of employees, the prehire agreement is not prospectively binding. Either party to the agreement may void it. While the agreement remains in effect, however, it must be observed by the parties.

The Eighth and Tenth Circuits also have held that proof of majority status is unnecessary in private suits for the collection of overdue fringe benefit contributions payable under Section 8(f) agreements. *Contractors Health & Welfare Plan* v. *Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981); *New Mexico District Council of Carpenters* v. *Mayhew Co.*, 664 F.2d 215 (10th Cir. 1981).[8]

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[8] The court below contrasted its view with that of the Eighth and Tenth Circuits on the apparent assumption that they, unlike it, have concluded that a Section 8(f) agreement is enforceable in a Section 301 suit even with respect to the time period subsequent to repudiation (Pet. App. 4-5). In fact, neither of the cited cases purports to decide the voidability issue. In *Mayhew Co., supra*, no claims based on the post-repudiation period were presented. The employer had sent a notice on December 9, 1977, announcing its intention not to be bound by any successor agreement, and the trust fund contributions at issue under the existing agreement were for a period extending only "to December, 1977" (664 F.2d at 218). In *Associated Wrecking Co., supra*, the Eighth Circuit expressly declined to reach the question whether "a prehire agreement, even in the absence of majority status, may be enforced against an employer until the employer takes affirmative steps to void the agreement." (638 F.2d at 1130 & n.5 (citing *Florida Marble Polishers Health & Welfare Trust Fund* v. *Megahee*, 102 L.R.R.M. (BNA) 2740, 2741 (M.D. Fla. 1979)). Moreover, the court of appeals ultimately remanded the case to the district court for determination of the "duration" of the agreement (638 F.2d at 1134). Furthermore, in a subsequent decision the Eighth Circuit characterized its decision in *Associated Wrecking*

We show below that the latter position—that, regardless of the union's majority status 8(f) contracts may be retrospectively enforced against signatory employers who have failed to make the requisite payments for work performed by employees under those contracts—comports with national labor policy.

B. Enforcement Of Obligations Accrued Under A Prehire Contract Prior To Its Repudiation Does Not Impair The Right Of Employees To Select Their Own Bargaining Agent

1. Petitioner contends (Br. 25; emphasis in original) that judicial enforcement of retrospective obligations under a prehire agreement absent proof of the union's majority status "conflicts with the *fundamental right* of employees to select their own representative; is inconsistent with the statutory scheme requiring the union to establish its majority status; and, in effect, affords the union the presumption of majority status that Congress specifically rejected." But petitioner overlooks the fact that Section 8(f) was specifically intended as an exception to the rule forbidding agreements with minority unions (see *Higdon, supra*, 434 U.S. at 345; pages 9-10, *supra*); the question this case presents is the scope of that exceptional status. More specifically, petitioner's argument ignores both the fact that prehire agreements were designed to do more than serve as a preliminary step for the establishment of the union's status as bargaining representative as well as the distinction between retrospective and prospective enforcement of contractual obligations.

As Judge Wilkey observed for the court in *Overhead Door Co., supra*, 681 F.2d at 8,

> a prehire agreement serves two important purposes. First, it matures into a fully effective collective bar-

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as one dealing with a "prehire agreement [that] had been operable for two years," which the court had been "asked to enforce * * * retrospectively." *W.C. James, Inc.* v. *Oil Workers International Union*, 646 F.2d 1292, 1295 n.4 (1981).

> gaining agreement once the union represents a majority of the workers. Second, it serves as the terms of employment for the workers hired by the consenting employer. It is indisputable that Congress intended the second purpose; otherwise, section 8(f) would not permit prehire agreements ever to be followed prior to the union's demonstration of its majority status.

Thus, while the prehire agreement preliminarily establishes the union's status as bargaining agent, it also "sets the compensation for services rendered to the employer while the agreement remains in effect" (*Overhead Door Co., supra*, 681 F.2d at 9). To be sure, if an employer were ordered to adhere to the agreement prospectively, it would be deprived of its right unilaterally to repudiate or modify it in the absence of the union's establishment of majority status. As the court noted in *Overhead Door Co., supra*, 681 F.2d at 9 (emphasis in original; footnotes omitted), "[t]o hold that an employer is prospectively bound to follow section 8(f) contracts would contravene the principle that adherence to them be *voluntary*. Moreover, it would effectively force the employer to recognize and bargain with a union before the union had proved its majority status. This result would violate the policy of employee free choice which was emphasized in the [*Higdon*] decision." Retrospective enforcement of the terms of the agreement for the period prior to repudiation, however, does not require the employer to continue to recognize or bargain with the union. It is required only to perform its part of a bargain already struck at a time when it lawfully and voluntarily (see note 13, *infra*) recognized the union, and then only until such time as it makes clear that the bargain is no longer operative. See 681 F.2d at 9.

Moreover, as shown above (page 10, *supra*), the final proviso to Section 8(f) affords employees the right to call for an election at any time if they are dissatisfied with the 8(f) agreement, and Section 8(b)(7) protects this right from undue recognitional pressure. Permitting

retrospective enforcement of the monetary obligations that accrued prior to the employees' exercise of the Section 8(f) proviso right does not, contrary to petitioner's assertion (Br. 37-39), render their election rights meaningless. The exercise of the employee's election right to reject the contract terminates the union's Section 8(f) right to act as a lawful representative of the employees for the future. Collecting overdue obligations that accrued prior to that time thus is not inconsistent with the employee's free choice of bargaining representative.

The Board, too, has acknowledged the distinction between retrospective and prospective enforcement of a collective agreement. In *International Union of Operating Engineers, Local 150 (Tri-City Excavating, Inc.)*, 255 N.L.R.B. 597 (1981), the union, which had not acquired majority status, picketed an employer for more than 30 days without a representation petition having been filed in order to compel payment of trust fund obligations that had already accrued under a prehire agreement. The Board dismissed the allegation that the picketing violated Section 8(b)(7)(C) of the Act, concluding (255 N.L.R.B. at 601) that the object of the picketing was not "to secure recognition of the [union] as current bargaining representative or to require application of the recognition provision or other terms of the 8(f) agreement previously entered into." The Board asserted (*ibid.*) that its position was "consistent with the concept that relationships protected by Section 8(f) must be voluntary," pointing out (*ibid.*) that "[t]he [union's] picketing was limited to requiring the [employer] to meet obligations which allegedly had accrued under an 8(f) contract and was not directed at forcing continuation of the 8(f) relationship." Finally, the Board distinguished *Higdon*, explaining (*id.* at 601-602) that

> [i]n *Higdon*, a labor organization which had not attained majority status under an 8(f) contract picketed to require the contracting employer to apply the contract to its non-union operations. Satisfaction of the picketing demands there would have required

> current application of the 8(f) contract, including recognition of the labor organization as bargaining representative. In these circumstances the Board found the picketing was for initial recognition because the employer had no 8(a)(5) obligation, under the Board's decision in *R.J. Smith*, to continue in effect an 8(f) contract when the contracting union had not achieved majority support. The Court accepted the Board's finding that the picketing was recognitional in purpose. * * * The Court's statement that 'Picketing to enforce the Sec. 8(f) contract was the legal equivalent of picketing to require recognition as the exclusive agent' must be read in connection with the fact that the 'enforcement' there sought by picketing was current application of the 8(f) contract. Unlike that situation the 'enforcement' sought by the [union's] picketing [here] was payment of an alleged past obligation under the 8(f) contract and did not require current application of the contract.

2. Petitioner contends (Br. 30-32) that to require it to give notice to the Union of its repudiation of the contract in order to avoid retrospective liability in a Section 301 suit would be inconsistent with the Board's holding in *R.J. Smith Construction Co., Inc.*, 191 N.L.R.B. 693 (1971), which was approved by this Court in *Higdon*.[9] See also Pet. Br. 43-47. In *R.J. Smith*, the Board held that an employer does not violate Section 8(a)(5) of the Act by refusing to honor a prehire agreement where the union has not established majority status. But petitioner overlooks the critical distinction between the employer's obligation under the Act to deal with the representative of the majority of its employees and its duty to satisfy lawful contractual obligations that accrued during the

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[9] Thus, petitioner notes (Pet. 30) that, although in both *R.J. Smith* and a companion case, *Ruttman Construction Co.*, 191 N.L.R.B. 701 (1971), the employers had concealed their noncompliance with the contracts from the unions, the Board nevertheless held that, since the unions had never acquired majority status, the employers did not violate the Act by ignoring the contracts.

period when it ostensibly had accepted the contract—a distinction that marks the line between, on the one hand, the Board's concerns under Section 8(a)(5) of the Act, and, on the other, the concerns of a court applying federal contract law in a Section 301 suit.

Because the statutory obligation to recognize and bargain with a union applies only to the representative of a majority of the employees in the unit (see 29 U.S.C. 158(a)(5), 159(a)), the Board cannot bring the Act's sanctions to bear on an employer that refuses to honor a contract with a minority union. Hence, in cases involving alleged violations of Section 8(a)(5) of the Act, it is the union's majority status—not the employer's decision whether openly to repudiate the contract or secretly to ignore it—that is determinative. But the fact that the failure of an employer openly to repudiate a contract is irrelevant in an unfair labor practice case, if the union actually lacks majority status, does not mean that any policy of the Act is violated when a court in a Section 301 suit holds an employer to its bargain under a Section 8(f) contract for a period prior to the time the union was notified of the employer's repudiation,[10] during which time the employer reaped the benefits of that contract. See *Associated Wrecking Co.*, *supra*, 638 F.2d at 1133; *Mahew Co.*, *supra*, 664 F.2d at 219-220. Like the union's picketing in *Tri-City Excavating*, *supra*, the legal compulsion of such a lawsuit does not enforce any recognitional obligation. See *Overhead Door Co.*, *supra*, 681 F.2d at 9-10.

This distinction between contractual obligations and statutory obligations is consistent with the principles that

[10] The court below did not hold that formal notice of an intent to repudiate is always required, but rather acknowledged (Pet. App. 8) that, in a given situation, noncompliance might be "so bald as to put the union on notice of the employer's intent to repudiate." Petitioner does not contend that its conduct here was "so bald" as to put the Union on notice of its intent to repudiate; to the contrary, petitioner sought to conceal such intent by filing false reports with the trust funds (see page 2, *supra*).

not every breach of a collective bargaining agreement constitutes an unfair labor practice and that Congress contemplated that mere contractual breaches would be left for resolution by the usual processes of the law. See *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 186-187 (1971): cf. *NLRB* v. *Strong*, 393 U.S. 357, 360-361 (1969). Thus, in *Allied Chemical Workers*, the Court held that it was not an unfair labor practice for an employer to modify contractual provisions concerning the pension rights of retired employees. Since the employer had no obligation to bargain with the union concerning retired employees, the Court reasoned that matters affecting them were not mandatory subjects of bargaining. The Court cautioned (404 U.S. at 181 n.20; citation omitted), however, that

> [t]his does not mean that when a union bargains for retirees—which nothing in this opinion precludes if the employer agrees—the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed. See *Smith* v. *Evening News Assn.*, 371 U.S. 195, 200-201 (1962); *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 470 (1960).

So, too, here. Because the Union is not the majority representative of petitioner's employees, it has no right to insist that petitioner bargain with it before altering the employees' terms of employment provided by the 8(f) contract. It does not follow, however, any more than it did in *Allied Chemical Workers*, that petitioner's pre-repudiation breach of the contract cannot be redressed in a Section 301 suit.

3. Nor is there merit to petitioner's assertion (Br. 36-37) that the holding below is incompatible with the Court's statement in *Higdon* (434 U.S. at 351-352), that

"[i]t would not be inconsistent with *Lion Dry Goods* [11] for a court to hold that the union's majority standing is subject to litigation in a § 301 suit to enforce a § 8(f) contract, just as it is in a § 8(a)(5) unfair labor practice proceeding, and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable." As the District of Columbia Circuit observed in *Overhead Door Co., supra*, 681 F.2d at 8 n.31,

> In *Lion Dry Goods* the Court held that § 301 of the Labor Management Relations Act confers jurisdiction on the federal courts to hear suits based on § 8(f) contracts. All *Iron Workers* [*Higdon*] added was that this holding did not compel the conclusion that § 8(f) agreements are enforceable, since the jurisdictional question differs from the enforceability question. Nothing further can be read into *Iron Workers*.[12]

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[11] *Retail Clerks International Association* v. *Lion Dry Goods, Inc.*, 369 U.S. 17 (1962). There, the Court held that Section 301 confers jurisdiction on the federal courts to entertain suits on contracts between an employer and a minority union, as well as those with majority-designated collective bargaining agents. *Id.* at 28-29. Section 8(f) contracts were expressly noted as being in the former category. 369 U.S. at 29.

[12] Petitioner also relies (Br. 21) on certain language contained in the Board's reply brief in *Higdon, supra*. It was the Board's position in *Higdon*, which the Court subsequently adopted, that a Section 8(f) agreement does not make a union the collective bargaining representative of unit employees so as to permit it to enforce the agreement by picketing in excess of the limits prescribed by Section 8(b)(7)(C) of the Act for recognitional picketing. The union argued, however, that *Lion Dry Goods* was contrary to the Board's position. In its reply brief (at 2), the Board responded that, in *Lion Dry Goods*, the Court held only that federal courts have jurisdiction under Section 301(a) to entertain suits on agreements with a minority union, not that such agreements would be fully enforceable in all circumstances. The brief further explained (at 2-3) that *Lion Dry Goods* could not have meant that agreements would be enforceable even when this would contravene the policies of the National Labor Relations Act. But the Board suggested (*Higdon* Reply Brief at 2-3) several examples of circumstances in which a suit could properly be brought under Section 301(a), and one of

C. The Policies Underlying Section 8(f), as Well as Equitable Considerations, Support the Conclusion That Obligations Accrued Under Contracts Authorized by That Section May be Enforced Through Private Suits Without Proof That the Signatory Union Represented a Majority of the Employees

The policies underlying Section 8(f) are fully consistent with the rule that, regardless of majority status, contracts authorized by that Section may be retrospectively enforced to collect overdue fringe benefit contributions. Congress enacted Section 8(f) in part to make possible continuous contract coverage for construction employees, who, in the normal exercise of their duties, might work on various projects only for short periods of time or during phases of the project when the number of employees on the site was not a representative complement for purposes of determining majority support. See *Higdon, supra*, 434 U.S. at 348-349; note 4, *supra*. It is antithetical to this purpose to permit an employer to accept the labor of these employees under a contract that Congress determined should be lawful and then to avoid paying the contract price of their services by pointing to a fact—the union's inability to prove majority status within the meaning of Section 9(a) of the Act—that was one of the reasons for Congress' enacting Section 8(f) in the first place. "It is hardly reasonable to suppose Congress intended unions to be required to make a showing in suits to enforce § 8(f) contracts which it considered nearly impossible to make when enacting that section." *Martin* v. *Benesh & Burns, Inc.*, 532 F. Supp. 408, 415 (N.D. Ill. 1982) (footnote omitted). As the District of Columbia Circuit added in *Overhead Door Co., supra*, 681 F.2d at 9, "[w]e do not believe Congress intended to permit an employer to accept labor services under a prehire agreement, refuse to pay wages, and yet

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those circumstances was an instance in which the employer "agrees to be bound by the agreement."

be immune from suit to recover the wages on the ground that the contract is unenforceable."

Moreover, as *Tri-City Excavating*, *supra*, illustrates (255 N.L.R.B. at 599, 601), where the employer does not (as petitioner did here) file false reports with the fringe benefit trust funds, but instead honestly reports the names of the covered employees, the employees are entitled to collect benefits from the trust funds. It can hardly be said to be in the employees' interests for the employer to fail to make the contributions necessary to assure the continued payment of these fringe benefits and thereby jeopardize the employees' ability to collect full benefits from these funds in the future. And should the employees subsequently determine that they no longer wish to remain eligible to receive benefits under these trust funds, they retain the power under Section 8(f)'s proviso to reject the contract and end their employer's liability to make payments on the basis of the work they perform in the future.

Nor is any legitimate employer interest impaired if the wages and fringe benefits earned by employees under lawful 8(f) contracts are recoverable in Section 301 suits. Employers are under no statutory compulsion to enter into such agreements with construction unions, and, as the majority of the courts of appeals that have considered the issue have recognized, employers who voluntarily [13] execute such contracts thereby qualify to re-

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[13] Contrary to petitioner's assertion (Br. 41-43), this case presents no occasion for the Court to determine whether accrued obligations under an 8(f) contract could be enforced in a Section 301 suit where the contract was entered into as a result of unlawful union coercion. See *Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982); slip op. 18 n.17; see also *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616, 632-633 (1975). Petitioner does not allege that the Union representative did anything other than inform McNeff that he would be required to sign the Master Labor Agreement to remain on the project (Br. 4). The prime contractor's representative also stated those same terms for remaining on the project. The Union neither picketed nor threat-

ceive valuable benefits—among them a reliable means for computing construction labor costs in advance of bidding, access to a supply of skilled workers readily available for dispatch as the needs of the job demand, and a reasonable assurance of labor peace for the duration of the agreement. *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co., supra*, 681 F.2d at 8-9; *New Mexico District Council of Carpenters* v. *Mayhew Co., supra*, 664 F.2d at 220; *Contractors Health & Welfare Plan* v. *Associated Wrecking Co., supra*, 638 F.2d at 1134. Moreover, where, as here, the union has a collective bargaining agreement with the general contractor requiring that subcontracts be let only to employers signatory to an agreement with the union, a subcontractor that signs a prehire agreement with the union receives, as petitioner did, the benefit of obtaining, and retaining, a job with that general contractor.[14] "Thus, the benefits of a prehire

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ened to picket; rather, it was the prime contractor's power to cancel the subcontract that "coerced" petitioner into accepting those conditions and signing the Agreement. Put another way, the prime contractor made it clear that the contract conditions included signing the Master Labor Agreement, a perfectly lawful condition in the construction industry (see note 14, *infra*). An implied threat by one party not to contract unless certain lawful terms are agreed to is "an accepted part of the bargaining process" and does not result in a void contract. *Restatement (Second) of Contracts* § 176, Comment a, at 482 (1981). Neither is it a violation of the Act for one employer to refuse to deal with another employer because of the union or nonunion status of the latter's employees. *Local 447 (Malbaff Landscape Construction)*, 172 N.L.R.B. 128, 129 (1968).

[14] As this Court held in *Woelke & Romero Framing, supra*, slip op. 16, union signatory subcontracting clauses are lawful in the construction industry, and fulfill legitimate needs of the employees of the various subcontractors on a construction job, who "have a close community of interest" and whose wages and working conditions affect each other. The Court also noted (*id.* at 19) that, "[w]hen a union obtains a subcontracting clause from a general contractor, subcontractors frequently attempt to ensure that they remain eligible for work by entering into a § 8(f) agreement * * * with the union."

agreement for fringe benefits do not travel down a one-way street. An employer who accepts the benefit of such an agreement must also honor its obligation under that agreement." *Contractors Health & Welfare Plan* v. *Associated Wrecking Co., supra,* 638 F.2d at 1134.

II. SECTION 306(a) OF THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980 PRECLUDES AN EMPLOYER FROM RAISING THE UNION'S MINORITY STATUS AS A DEFENSE TO AN ACTION TO COLLECT OVERDUE TRUST FUND CONTRIBUTIONS UNDER A VALID 8(f) CONTRACT

A. In Enacting Section 306(a) Congress Intended to Foreclose the Precise Defense Petitioner Seeks to Raise Here

Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980 (MPPA), 94 Stat. 1295, 29 U.S.C. (Supp. IV) 1145, provides an alternative ground for affirmance of the decision of the court of appeals. That section, which is entitled, "Delinquent contributions," provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

The legislative history of Section 306(a) makes clear that Congress specifically intended it to prohibit employers from raising the minority status of a union signatory to an 8(f) agreement in a suit for the collection of overdue trust fund obligations payable under the agreement. The Section was enacted because "simple collection actions brought by plan trustees [had] been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions," and

steps were necessary to "simplify delinquency collection." Staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980, S. 1076: Summary and Analysis of Consideration* 44 (Comm. Print 1980); See *Kaiser Steel Corp.* v. *Mullins*, No. 80-1345 (Jan. 13, 1982), slip op. 14. During floor debate, Senator Williams and Representative Thompson [15] cited case law examples of the types of defenses the provision was designed to abolish (126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980); *id.* at S11673; see *Kaiser Steel Corp.* v. *Mullins*, *supra*, slip op. 14-15):

> [W]e endorse judicial decisions such as *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); and *Huge* v. *Long Hauling Company, Inc.*, 590 F.2d 457 (3rd Cir. 1978) [, cert. denied, 442 U.S. 918 (1979)]. Cases such as *Western Washington Laborers-Employers Health and Security Trust Fund* v. *McDowell* * * *, 103 LRRM 2219 (W.D. Wash., 1979) and *Washington Area Carpenters Welfare Fund, et al.* v. *Overhead Door Company*, [488 F. Supp. 816 (D.D.C. 1980)], are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.

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[15] The provision that eventually was enacted as Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980 was added to S. 1076, 96th Cong., 2d Sess. (1980), the Senate counterpart of H.R. 3904, 96th Cong., 2d Sess. (1980), which became the Act, by the Senate Committee on Labor and Human Resources. Senator Williams was Chairman of the Senate Committee on Labor and Human Resources and floor manager of S. 1076. Representative Thompson was Chairman of the House Education and Labor Committee and floor manager of H.R. 3904. *Kaiser Steel Corp.* v. *Mullins*, *supra*, slip op. 14 & n.10. As this Court has noted, the explanation of a provision by the chairman of the committee that proposed it "is entitled to substantial weight." *Woelke & Romero Framing, Inc.* v. *NLRB*, *supra*, slip op. 10 n.9.

Both cases the Congressmen cited with disapproval concerned the precise issue that is involved here: whether the alleged invalidity of a prehire agreement under Section 8(f) of the NLRA prevented pension fund trustees from collecting delinquent contributions. In each case, the district court had resolved that question against the pension fund.[16] The floor managers' disapproval of the results in those cases thus clearly establishes that Congress intended that contributions due under a Section 8(f) agreement would be recoverable notwithstanding the signatory union's minority status. Additional evidence of this congressional intent is supplied by the same Congressmen's floor statements to the effect that "[f]ederal pension law must permit trustees of plans to recover delinquent contributions efficaciously, *and without regard to issues which might arise under labor-management relations law* —other than 29 U.S.C. 186."[17] 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (emphasis added); *id.* at S10102 (daily ed. July 29, 1980) (emphasis added).[18]

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[16] Both cases were reversed on appeal after passage of the MPPA. See *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 681 F.2d 1 (D.C. Cir. 1982) (discussed at pages 12-13, *supra*); *Western Washington Laborers-Employers Health & Security Trust Fund* v. *McDowell*, 673 F.2d 1341 (9th Cir. 1982) (table).

[17] Subsection (c)(5) of 29 U.S.C. (Supp. IV) 186 sets out the rules governing the administration of employee pension and welfare trust funds. It requires (A) that the employer's payments be held in trust for the purpose of making medical, pension, compensation or insurance payments for the benefit of employees and their families and dependents; (B) that the detailed basis on which such payments are to be made be specified in a written agreement with the employer and that the employers and employees be equally represented in the administration of the fund; and (C) that such payments as are intended to be used for providing pensions or annuities be paid to a separate trust.

[18] Unlike in *Kaiser Steel*, *supra*, slip op. 15-16, there is no question of implied repeal here because, as we showed above (pages 14-24, *supra*), the policies underlying Section 8(f) are not offended by the retrospective enforcement of obligations that accrued under

This Court recently construed Section 306(a) in *Kaiser Steel Corp.* v. *Mullins, supra.* There, the collective bargaining agreement between Kaiser and the union required Kaiser to make contributions to employee benefit funds based on each ton of coal produced, each hour worked by covered employees, and each ton of coal purchased from operators that did not contribute to the trusts pursuant to the contract. Slip op. 1-2. When the trustees of the funds sued Kaiser to recover contributions due for the coal it had purchased from non-contributing operators, Kaiser defended on the ground that the purchased coal provision was void and unenforceable as violative of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and Section 8(e) of the NLRA, 29 U.S.C. 158(e). Slip op. at 3. The district court granted summary judgment for the trustees and the court of appeals affirmed, both rejecting Kaiser's illegality defense without deciding the legality of the purchased coal clause. *Ibid.* This Court reversed, holding that "illegal promises will not be enforced in cases controlled by federal law," *id.* at 4, and that Section 306(a), assuming it was applicable, did not alter that result, slip op. 15. The Court expressly rejected the contention that Section 306(a) abolished illegality defenses, concluding instead that the provision "explicitly requires employers to contribute to pension funds only where doing so would not be 'inconsistent with law.'" *Ibid.* The Court noted that Senator Williams and Representative Thompson "did not say that employers should be prevented from raising all defenses; rather they spoke in terms of 'unrelated' and 'extraneous' defenses" (*ibid.*; footnote omitted).

The decision below is fully consistent with *Kaiser Steel.* Unlike Section 8(e) of the National Labor Relations Act, which expressly makes agreements prohibited thereunder

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a contract authorized by that Section. At all events, even if there were any such incompatibility, the foregoing legislative history would be "'clear and manifest'" evidence of Congress' intent to modify Section 8(f) to the extent it is inconsistent with Section 306(a).

"unenforceable and void," prehire agreements are specifically sanctioned by Section 8(f) of the Act. As shown above (pages 8-9, *supra*), it would not be inconsistent with law or illegal for petitioner to honor the prehire agreement in the absence of the Union's establishment of majority status. Rather, petitioner and the Union voluntarily could continue the agreement in effect indefinitely so long as the covered employees did not seek a representation election. As Judge Wilkey, whose dissenting views in *Mullins* v. *Kaiser Steel Corp.*, 642 F.2d 1302, 1320-1335 (D.C. Cir. 1980), were adopted by this Court, explained in *Overhead Door Co.*, *supra*, 681 F.2d at 4-5 (emphasis in original; footnotes omitted),

> [t]he *Mullins* [*Kaiser Steel*] decision rested on the alleged *illegality* of the contract. Since payment by Overhead Door to the Funds pursuant to the prehire agreements would not be illegal, as allegedly would payment by a coal producer pursuant to the purchased coal clause, *Mullins* may be distinguished. More important, the Court specifically cited legislative history indicating that the 1980 Act was intended to reverse the result in this very case. 'Both [the House and Senate floor managers of the bill] also stated that they . . . disapproved cases such as *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 488 F. Supp. 816 (DC 1980), *appeal pending* . . .' This specific reference in the legislative history, combined with the Act's purpose of making it easier for union funds to recover unpaid contributions, provides support for a holding that Overhead Door may not defend this suit on the basis of the alleged unenforceability of section 8(f) agreements.[19]

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[19] Although the District of Columbia Circuit was of the view (681 F.2d at 4) that "[t]here are substantial reasons for believing that the combined effect of [*Kaiser Steel*] and the [MPPA] is to prohibit an employer from defending a trust fund suit on the basis of the alleged unenforceability of prehire agreements," it nevertheless determined (*id.* at 5) not to resolve the *Overhead Door* case on the basis of Section 306(a). Rather, in view of the retroactivity question (see pages 29-30, *infra*), the failure of the appellants in the case to rely on the provision directly, and the fact that "the

Moreover, as shown above (page 28, *supra*), petitioner's contention concerning the Union's lack of majority status is "unrelated" to petitioner's responsibility for pre-repudiation payment obligations. While the Union's minority status enabled petitioner to repudiate the contract, it did not render it void or unlawful and thus did not eliminate obligations that had accrued prior to the repudiation.[20]

B. Section 306(a) Is Applicable to This Case

As the law currently in effect, Section 306(a) is applicable to this case notwithstanding that the MPPA was not in effect at the time the Agreement was signed. In *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974), this Court held that an appellate court is bound to "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." See also *Hutto* v. *Finney*, 437 U.S. 678, 694-695 n.23 (1978); *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975); *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 281-282 (1969); *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).[21] For the reasons stated

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unavoidable effect of preventing employers from raising the unenforceability defense in cases such as this one will be to make prehire agreements enforceable, at least retrospectively" (681 F.2d at 5), the court "prefer[red] to resolve this issue on the basis of the history and purpose of section 8(f) * * *" (*ibid.*) (see pages 12-13, *supra*).

[20] As we showed above (pages 8-24, *supra*), prehire agreements are retrospectively, but not prospectively, enforceable under 29 U.S.C. 185. Section 306(a) of the MPPA does not alter this distinction. It deprives neither an employer of its right to repudiate or modify the agreement before the union establishes majority status nor employees of their right to petition for a representation election.

[21] In *Kaiser Steel*, *supra*, the Court assumed *arguendo* that Section 306 applied to an agreement signed before the Act's effective date. Slip op. 15. The dissent was convinced of Section 306's applicability based on its analysis of *Bradley* v. *Richmond School Board*, *supra*, slip op. 2-3 n.1 (Brennan, J., dissenting).

at pages 31-35 of our brief in *Kaiser Steel, supra*,[22] and by Justice Brennan in his opinion dissenting on other grounds in that case (at 2-3 n.1), we submit that neither the language nor the legislative history of Section 306(a) contains any suggestion that it was not intended to apply to pending cases; nor would the application of that provision in this case result in "manifest injustice."[23]

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[22] We are serving a copy of that brief on counsel for the parties in this case. See also pages 7-8, *supra*, summarizing the views stated in our brief in *Kaiser Steel* as they apply to this case.

[23] The defense of unenforceability does not assert a vested private right. See *Bradley, supra*, 416 U.S. at 720. Surely petitioner cannot claim that a prehire agreement obligating it to contribute to the funds vested in it a matured, unconditional right *to be free* from having to make those contributions.

Moreover, that the issue presented here is one of "great national concern" (*Bradley, supra*, 416 U.S. at 719, quoting 5 U.S. (1 Cranch) 102, 110 (1801)), was made clear in statements made by Senator Williams and Representative Thompson (126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (emphasis added); *id.* at S11673 (emphasis added):

> Because delinquencies of employers in making required contributions are also a serious problem for many multiemployer plans, we wish to make clear the public policy in this area, which this bill is intended to further. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorney's fees and other legal costs arise in connection with collection efforts.
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability for all employers.
>
> * * * *Sound national pension policy* demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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